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No. 73-1318

In the Supreme Court of the United States

OCTOBER TERM, 1973

CARL STUART STANLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a question asked by the prosecutor in the presence of the jury violated his Fifth Amendment right not to incriminate himself.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of a six-count indictment of conspiring to violate 18 U.S.C. 2312 (interstate transportation of stolen motor vehicles), in violation of 18 U.S.C. 371. Petitioner was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Pet. App. 3). The court of appeals affirmed the conviction *per curiam* (Pet. App. 1).

While petitioner was being cross-examined, the following colloquy took place (Tr. 402):

Q. Now, Mr. Stanley, let me go over this again. Did you sit down and discuss this case with us at any great length?

A. No sir, not after you—

Q. All right.

A. Not after you told me I was a suspect. I told you I would prefer to have a lawyer present.

Q. That is correct, and you were advised of your rights?

A. Yes, sir.

Q. You never made any statement to—

[Defense Counsel]: Objection. If Your Honor please, that is absolutely improper.

The judge overruled petitioner's objection and stated that it was incumbent on the government to advise petitioner of his constitutional rights prior to questioning him.[1] Government counsel immediately turned his attention to other matters and did not pursue the line of questioning to which petitioner's counsel had objected. No further reference was made to the above colloquy or to petitioner's refusal to provide information to the prosecuting attorney prior to trial.

In the circumstances, the above-stated exchange was not a comment on the privilege. Indeed, petitioner himself referred to his request to have a lawyer present, after government counsel apparently attempted to foreclose any further comment in response to the original question. Thus, petitioner himself encouraged the exchange

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[1]The defense never requested a curative instruction on this point, nor did it object to the judge's failure to give such an instruction during his charge to the jury.

to which he now objects. This is not a case where the government has requested the jury to draw any inference of guilt from petitioner's assertion of his privilege against self-incrimination. Cf. *Griffin* v. *California*, 380 U.S. 609. Petitioner's silence in the prosecutor's office was not used to impeach his trial testimony. Cf. *Harris* v. *New York*, 401 U.S. 222; *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9). Nor was there any meaningful examination relating to petitioner's assertion of his Fifth Amendment rights for the purpose of creating an impermissible inference for the jury. Cf. *Grunewald* v. *United States*, 353 U.S. 391; *Fagundes* v. *United States*, 340 F. 2d 673 (C.A. 1). The prosecutor made no attempt to comment on the petitioner's failure to make statements prior to trial. Cf. *United States* v. *Anderson*, 481 F. 2d 685 (C.A. 4); *Fowle* v. *United States*, *supra*, 410 F. 2d at 49. Accordingly, there has been no showing of either improper cross-examination by the prosecutor or of any possible prejudice to petitioner.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[2]The instant case is thus distinguishable from *United States* v. *Matos*, 444 F. 2d 1071 (C.A. 7), upon which petitioner relies, in which the defendant's failure to make a statement explaining his conduct when he was apprehended bore "directly on a precisely vital question of [his] intention" (*id.* at 1074).